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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/877,757	06/08/2001	Elizabeth Varriano-Marston	MARS93-DIV	3933

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EXAMINER	
PATTERSON, MARC A	
ART UNIT	**PAPER NUMBER**
1772	3

DATE MAILED: 07/18/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

MF 3

Office Action Summary	Application No.	Applicant(s)	
	09/877,757	VARRIANO-MARSTON, ELIZABETH	
	Examiner	Art Unit	
	Marc A Patterson	1772	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *08 June 2001* .

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-14* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-14* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 2 .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: .

DETAILED ACTION

Election/Restrictions

1. Restriction to one of the following inventions is required under 35 U.S.C. 121:

   I. Claims 1 – 14, drawn to a packaging material, classified in class 428, subclass 34.1.

   II. Claims 15 – 20, drawn to a produce packaging material, classified in class 426, subclass 106.

2. Inventions I and II are related as combination and subcombination. Inventions in this relationship are distinct if it can be shown that (1) the combination as claimed does not require the particulars of the subcombination as claimed for patentability, and (2) that the subcombination has utility by itself or in other combinations (MPEP § 806.05(c)). In the instant case, the combination as claimed does not require the particulars of the subcombination as claimed because it is not necessary for a packaging material to be formed by laser microperforation. The subcombination has separate utility such as a packaging material in which laser microperforation must be used.

3. Because these inventions are distinct for the reasons described above, and have acquired a separate status in the art because of their recognized different classification and subject matter, and because the search required for Group I is not required for Group II, restriction for examination purposes as indicated is proper.

4. During a telephone conversation with Mr. Scott Asmus on June 20, 2002 a provisional election was made with traverse to prosecute the invention of I, claims 1 – 14. Affirmation of this election must be made by applicant in replying to this Office action. Claims 15 – 20 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

Claim Rejections - 35 USC § 112

5. The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

6. Claims 1 – 14 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. With regard to Claim 1, the phrase 'said set of microperforations are calculated' is indefinite, because it is unclear what property was calculated. For purposes of examination, it will be assumed that any property is calculated. The phrase 'registered target area is indefinite, as its meaning is unclear. For purposes of examination, the phrase will be assumed to mean any area on the packaging.

With regard to Claim 2, the phrase 'in monolayers, coextrusions and laminates' is indefinite as its meaning is unclear. For purposes of examination, the phrase will be assumed to mean 'in monolayers, coextrusions or laminates.'

With regard to Claims 3 and 8, the term 'sealable' is indefinite, as it is unclear whether sealing occurs or not. For purposes of examination, it will be assumed that sealing occurs.

With regard to Claims 5 – 6, the term 'flux' is indefinite, as no units of area are claimed. For purposes of examination, the area will be assumed to be 100 in^2.

With regard to Claim 7, the phrase 'wherein the polymeric material forms a bag' is indefinite, as its meaning is unclear. For purposes of examination, the phrase will be assumed to mean that a bag is formed of the polymeric material.

With regard to Claim 8, the phrase 'lidding film' is indefinite, as it is unclear whether a lid of film is claimed. For purposes of examintion, it will be assumed that a lid is claimed.

With regard to Claim 10 – 11, the phrases 'upper quarter' and 'upper third' are indefinite because the location of the perforations is unclear. For purposes of examination, the phrases will be assumed to refer to any location.

With regard to Claim 13, the phrase 'preferably 120 – 160 microns' is indefinite, as it is unclear whether 120 – 160 microns is being claimed. For purposes of examination, it will be assumed that 110 – 400 microns is being claimed.

With regard to Claim 14, the phrase 'preferably 3.4 – 4.0 times greater' is indefinite, as it is unclear whether 3.4 – 4.0 times greater is being claimed. For purposes of examination, it will be assumed that 2.5 – 5.0 times greater is being claimed.

Claim 9 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The term "semi - rigid" in claim 9 is a relative term which renders the claim indefinite. The term "semi - rigid" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention.

Claim Rejections - 35 USC § 102

7. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

8. Claims 1 – 3, 5 – 12 and 14 are rejected under 35 U.S.C. 102(b) as being anticipated by De Moor (U.S. Patent No. 6,013,293).

With regard to Claims 1 – 2 and 10 – 11, De Moor discloses an improved packaging (atmosphere control member; column 4, lines 36 – 46) for establishing optimum atmospheric conditions for respiring produce (respiring biological materials; column 4, lines 36 – 46), comprising a polymeric material (polyethylene; column 9, lines 9 – 25) and a set of microperforations on the polymeric material (the film is microporous; column 9, lines 9 – 25); the microperforations control the oxygen and carbon dioxide to specified concentrations within the package containing the respiring produce (thus an optimum atmospheric condition is set; column 4, lines 46 – 67).

With regard to Claim 3, the polymeric material is heat – sealed (column 4, lines 46 – 67).

With regard to Claims 5 – 6, the polymeric material provides a flux of 50,000 cc/100 in^2 atm day (column 5, lines 35 – 51).

With regard to Claim 7 – 9, a bag is formed of the polymeric material, which is heat sealed (column 4, lines 47 – 67; column 7, lines 58 – 67; column 8, lines 1 – 14); the polymeric material is therefore also a heat sealed lid and a container, and has a thickness greater than 8 mil (the thickness, as stated above, is 0.65 mm).

With regard to Claim 12, the film is gas – permeable (column 5, lines 35 – 51) and is therefore not occluded.

With regard to Claim 14, the film has a carbon dioxide transmission rate that is four times greater than the oxygen transmission rate.

Claim Rejections - 35 USC § 103

9. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

10. Claim 13 is rejected under 35 U.S.C. 103(a) as being unpatentable over De Moor (U.S. Patent No. 6,013,293).

De Moor discloses a microporous packaging as discussed above. De Moor fails to disclose a packaging having an average pore diameter of 110 – 400 microns. However, De Moor discloses a packaging having an average pore diameter of 0.24 microns (a pore size of 0.24 microns; column 6, lines 30 – 32). Therefore, the pore diameter would be readily determined through routine optimization by one having ordinary skill in the art depending on the desired end use of the product, absent a showing of unexpected results. It therefore would be obvious for one of ordinary skill in the art to vary the pore diameter, since the pore diameter would be readily determined through routine optimization by one having ordinary skill in the art depending on the desired end result as shown by De Moor. *In re Boesch and Slaney, 205 USPQ 215 (CCPA 1980).*

11. Claim 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over De Moor (U.S. Patent No. 6,013,293) in view of Clarke et al. (U.S. Patent No. 6,376,032).

De Moor discloses a microporous packaging as discussed above. De Moor fails to disclose a film thickness of 0.4 to 8 mil.

Clarke et al teach a thickness of 0.03 – 0.65 mm for microporous packaging (0.03 – 0.65 mm is 1 – 20 mil column 5, lines 48 – 49) for the purpose of packaging fresh produce (column 1, lines 18 – 20).

It therefore would have been obvious for one of ordinary skill in the art at the time Applicant's invention was made to have provided for a film thickness of 0.4 to 8 mil in De Moor in order to packaging fresh produce as taught by Clarke et al.

Conclusion

12. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Marc Patterson, whose telephone number is (703) 305-3537. The examiner can normally be reached on Monday through Friday from 8:30 AM to 5:00 PM. If attempts to reach the examiner by phone are unsuccessful, the examiner's supervisor, Harold Pyon, can be reached at (703) 308-4251. FAX communications should be sent to (703) 872-9310. FAXs received after 4 P.M. will not be processed until the following business day.

Marc A. Patterson, PhD.
Marc Patterson
Art Unit 1772

HAROLD PYON
SUPERVISORY PATENT EXAMINER
1772

7/2/02